

No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff in Error,

VS.

CALIFORNIA ADJUSTMENT COM-
PANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON RE-ARGUMENT

In Error to the United States District Court for the
Northern District of California, Second Division.

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BRIEF OF DEFENDANT IN ERROR ON RE-ARGUMENT

The Court has indicated that it desires further argument in relation to the causes of action which accrued after the amendment to the Constitution of October 10, 1911.

This matter is discussed in Defendant in Error's brief at pages 103 to 123 inclusive and in Defendant in Error's Supplemental Brief at pages 30 to 55 inclusive. The matter was discussed under the following head, viz.:

“The evidence sought to be introduced by plaintiff in error fails to show that the Railroad

Commission relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than for the shorter haul."

In this brief we shall present the argument bearing on the causes of action which accrued after October 10, 1911, under the following heads:

1. *After October 10, 1911, it was unlawful for a carrier to charge a higher rate for the shorter distance, unless it had applied to the Commission for relief and its application had been granted by the Commission after investigation.*

2. *Neither the order of November 20, 1911, nor the order of January 16, 1912, purport to grant any of the applications of the defendant.*

3. *The orders of the Commission offered in evidence do not purport to be orders of relief made after investigation as they show affirmatively that the investigation was to be held in the future.*

At the last oral argument matters relating to the causes of action which accrued prior to October 10, 1911, were also referred to. After the conclusion of the argument to be made under the heads above enumerated we shall reply to the argument of Plaintiff in Error insofar as it relates to the causes of action which accrued prior to October 10, 1911. The argument will be made under the same heads as in the brief and Supplemental Brief of Defendant in Error.

1. AFTER OCTOBER 10, 1911, IT WAS UNLAWFUL FOR A CARRIER TO CHARGE A HIGHER RATE FOR THE SHORTER DISTANCE UNLESS IT HAD APPLIED TO THE COMMISSION FOR RELIEF AND ITS APPLICATION HAD BEEN GRANTED BY THE COMMISSION AFTER INVESTIGATION.

As held by Judge Van Fleet, it was unlawful for a carrier *prior* to October 10, 1911, to charge more for the shorter distance. This was the necessary result of Section 21 of Article XII of the Constitution reading “*Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing,*” and of Section 22 of Article I of the Constitution reading “*The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.*”

When the Constitution was amended on October 10, 1911, the absolute prohibition against charging more for the shorter distance was changed to a prohibition with a relieving clause which permitted the Railroad Commission to authorize carriers to charge more for the shorter distance where, upon application of the carriers, the Commission, in special cases, and after investigation, should so order. On October 10,

1911, the long and short haul provisions of Section 21 of Article XII were amended to read as follows:

“It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul.”

Even if there had been no long and short haul prohibition at all in existence prior to October 10, 1911, it is clear that after the amendment of October 10, 1911, it would have been unlawful for a carrier to charge a higher rate for a shorter distance in any case unless it had upon application to the Commission been authorized to do so.

This results from the terms of the amended Section. Necessarily it became effective as soon as it was approved by the people. Its terms were strongly prohibitory and the way was pointed out by which

a carrier could obtain relief from the prohibition.

If the member of the Legislature who drafted this amendment had himself been the author of the language used and had not had resort to any other statute as a model, the amended Section on the clearest principles of statutory and constitutional construction would be held to be a prohibition effective at once and that no carrier could lawfully charge rates in violation thereof unless it brought itself within the terms of the exception to the prohibition by applying to the Commission for authority to do so and by obtaining an order of the Commission, made after investigation, authorizing such charges.

But in proposing the amended Section 21 the Legislature resorted to Section 4 of the Interstate Commerce Act as amended June 18, 1910, as a model. The following parallel columns will show how Section 21 of the Constitution resembles Section 4 of the Act of Congress and how it differs therefrom:

<i>Section 21 of Article XII of Constitution, as amended.</i>	<i>Section 4 of Act of Con- gress as amended June 18, 1910.</i>
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“It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of

“That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passen-

property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

gers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further, that no rates or charges lawfully existing*

at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

It will be seen at a glance that the amended Section 21 follows Section 4 of the Interstate Commerce Act almost word for word until the second proviso of Section 4 (italicized in the above quotation) is reached and that this second proviso was discarded. By this second proviso Congress enacted that existing rates violative of the prohibition need not be changed for six months after the passage of the Act and that in case applications for relief were filed they need not be changed until such applications were determined by the Commission.

Clearly if this proviso had not been contained in Section 4 the prohibition would have become effective at once. The proviso was deemed necessary in order to prevent the prohibition becoming effective immediately.

Congress was prohibiting an act which was theretofore legal, whereas the people of California desired to permit in the future an act which was theretofore illegal, provided the carrier could satisfy the Commission that it was entitled to relief from the prohibition. The statement last made relates merely to the motives which impelled Congress in the one case to postpone in certain instances the effect of the prohibition, and the people of California in the other case to fail to include in the Constitution the second proviso of Section 4 of the Act of Congress.

Whether or not it was lawful prior to October 10, 1911, to charge a higher rate for a shorter distance, the people of California have indicated in the most clear and unmistakable manner that the prohibition should become effective at once, and that a higher charge for the shorter distance was unlawful unless the Commission had upon application of the carrier, and after investigation, granted permission to the carrier to exact such a charge.

Counsel for Plaintiff in Error consistently avoid making any reference to the matters referred to above; but contend that certain provisions of Section 18 of the Act of February 10, 1911 (Eshleman Act), had the effect (in spite of the language of the amended Section 21) of legalizing after October 10, 1911, rates violative of the prohibition.

This contention, of course, is based entirely upon

the further contention that the Constitution as it existed prior to October 10, 1911, permitted the Commission to establish and the carriers to charge higher rates for the shorter distance.

For the purpose of the argument, however, we will meet counsel on their own ground and will assume (directly contrary to the fact) that the long and short haul prohibition of Section 21 as amended October 10, 1911, was the first Constitutional enactment upon the subject.

This contention of Plaintiff in Error is based upon Sections 15 and 18 of the Act of February 10, 1911 (Eshleman Act), and upon the reference to that Act made in Section 22 of Article XII of the Constitution which was adopted on October 10, 1911, at the same time that the amendment to Section 21 of Article XII was adopted. This reference is as follows:

“The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the ‘Railroad Commission Act’ of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith.”

The above quoted provision of Section 22 was inserted out of excess of caution in order that it might

not be held that by amending the Constitution in several material respects the people repealed the Act of February 10, 1911 (Eshleman Act).

Now it is clear that this reference to the Act of February 10, 1911 (Eshleman Act), in the amended Section 22 of Article XII of the Constitution had no other effect than to show the intent on the part of the people that the amendments to the Constitution should not operate to repeal or nullify that statute. The intent was clearly expressed that if *any part* of that act was *inconsistent with the Constitution that that part should be repealed*. The Act was placed on the same footing as if it had "been passed after" the adoption of the amendments to the Constitution.

Counsel say that Section 22 of Article XII of the Constitution made the Act of February 10, 1911 (Eshleman Act), a "part of the Constitution." But it is very clear that the reference to that act in the Constitution had no such effect. The Constitution did not make the act of February 10, 1911 (Eshleman Act), in any sense a part of the organic law; it merely provided that the act should be construed "with reference to" the constitutional provisions as amended, and that it should have the same force and effect as if it had been passed after the adoption of the amendments to the Constitution. The sole purpose of the reference was to prevent a repeal by implication.

Counsel for Plaintiff in Error refer to three pro-

visions of the Act of February 10, 1911 (Eshleman Act). The first reference is to the part of Section 15 reading:

“The Commission shall have power, and it shall be its duty, to establish rates of charges for the transportation of freight and passengers.”

Reference is also made to the provision of Section 18 that:

“The Commission may at any time abolish, alter, or in any manner amend any rate or classification upon notice and hearing.”

Counsel also refer to that part of Section 18 of the Act reading:

“All rates and charges for the transportation of passengers and freight, and all classifications established by the Commission shall remain in effect until changed by the Commission.”

As pointed out at page 122 of the Brief of Defendant in Error, Section 22 of Article XII of the Constitution as amended October 10, 1911, contains the same provisions as the Act of February 10, 1911 (Eshleman Act), with reference to the power of the Commission to establish rates. Section 22, as amended October 10, 1911, provided:

“Said Commission shall have the power to establish rates and charges for the transportation of passengers and freight by railroads and other transportation companies.”

It was wholly unnecessary for Plaintiff in Error to resort to the Act of February 10, 1911 (Eshleman

Act), for the purpose of locating the source of the Commission's power. Its only purpose in so doing was to confuse the argument. Plaintiff in Error desired to convey the erroneous impression that the power to establish rates was conferred by the Legislature and not by the Constitution, in order to argue that the power to establish rates was an "additional" power conferred upon the Commission by the Legislature in pursuance of the provision of Section 22 of Article XII authorizing the Legislature to confer upon the Commission "additional power" not inconsistent with the powers conferred upon the Commission by the Constitution. The further argument then follows that when the Legislature conferred upon the Commission the "additional power" of establishing rates such power in some unexplained way authorized the Commission to establish rates violative of the prohibition of Section 21 without the application or the investigation required by that section.

Now it is clear that it would make no difference whether the power to establish rates was conferred by the Constitution as amended October 10, 1911, or subsequently by the Legislature. The general power to establish rates coupled with the prohibition against establishing rates violative of the long and short haul prohibition is to be construed as preventing the establishment of rates violative of that prohibition. The manner in which a carrier may charge rates violative

of the prohibition is indicated by Section 21. The carrier was required to apply for relief; and if after investigation the Commission was satisfied that relief should be granted the Commission was empowered to authorize the carrier to charge rates violative of the prohibition.

The result would be the same if the Legislature and not the Constitution had conferred upon the Commission the power to establish rates.

It is very clear that the prohibition against charging more for the shorter distance controlled the general provision with reference to the establishment of rates. The Commission was empowered to establish rates but rates so established must be constitutional.

It was pointed out at page 122 of our brief that the power to establish rates was not conferred upon the Commission by the Act of February 10, 1911 (Eshleman Act), but by Section 22 of Article XII of the Constitution itself as amended October 10, 1911, at the same time that Section 21 was amended. Nevertheless at the last oral argument counsel for Plaintiff in Error again referred to the power to establish rates "given by Section 15 of the Eshleman Act."

The provision that rates established by the Commission should remain in effect until changed by the Commission was really superfluous, as rates established by the Commission necessarily remained in

effect until changed by that body. The power to establish rates was delegated to the Commission by the Constitution. A rate established by the Commission in pursuance of the power so delegated had the same effect as a statute establishing a rate would have had if the power to establish rates had been left with the Legislature. Whether established by the Legislature or by the Commission, a rate remained in effect until repealed or changed by the body authorized to establish it.

Even if the sections of the Constitution as amended on October 10, 1911, had incorporated therein a provision similar to the quoted provision of Section 18 of the Act of February 10, 1911 (Eshleman Act) to the effect that "rates established by the Commission shall remain in effect until changed by the Commission" such incorporation could not have in any manner impaired the effect of the prohibition of Section 21 against charging more for the shorter distance. Such a provision if it had been incorporated in Sections 21 or 22 would have been construed as relating to rates thereafter established by the Commission and would not be construed as in any manner impairing the strongly prohibitory language of the long and short haul clause of Section 21. Moreover, the provision would have been entirely superfluous, as rates established by the Commission would necessarily have remained in effect until changed by the Commission.

The part of Section 18 of the Act providing that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" if it had been incorporated into Sections 21 or 22, as amended October 10, 1911, would not have legalized any rates which the Constitution as so amended declared unlawful. *It would have related to rates thereafter constitutionally established by the Commission, not to rates theretofore established which the Constitution declared should be thereafter unlawful.*

It may be noted that this particular provision of the Act of February 10, 1911 (Eshleman Act) was not mentioned in either of the briefs of Plaintiff in Error. (Plaintiff in Error's original brief, pp. 56, 108; supplemental brief of Plaintiff in Error, p. 65.) The first reference thereto was made at the oral argument on the re-submission of the case.

We shall briefly summarize the parts of the Act of February 10, 1911 (Eshleman Act) referred to by Plaintiff in Error.

The provision of Section 15 referred to merely provides that the Commission shall have power to establish rates. A provision identical therewith is contained in Section 22 of Article XII of the Constitution as amended October 10, 1911.

The provision of Section 18 that rates established by the Commission should remain in force until

changed by the Commission was entirely superfluous, as such was the necessary consequence of their establishment by the Commission. If this provision had been contained in the Constitution itself as amended October 10, 1911, it would have added nothing thereto, and it could not possibly be construed as in any manner impairing the effect of the prohibition against charging more for the shorter distance. It would impair that prohibition not one whit more than it was impaired by the provision that the Commission should establish rates.

The provision of Section 18 of the Act that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" would not in any manner have impaired the effect of the prohibition of Section 21 if it had been incorporated bodily into the Constitution as amended October 10, 1911. It would have related merely to rates thereafter constitutionally established by the Commission. It would not have shown an intent on the part of the people that the prohibition of Section 21 should not become effective at once.

Now what counsel for Plaintiff in Error unconsciously contend for here is not merely that the Eshleman Act or the provisions of Section 18 referred to were incorporated bodily into the Constitution as amended October 10, 1911. This is the contention made by counsel; but it is apparent that this conten-

tion does not go far enough, as such incorporation would not help the Plaintiff in Error. To be of any service the contention would have to be, not only that the provisions of Section 18 of the Act were incorporated bodily into the Constitution, but that the provisions so incorporated were retroactive and governed and controlled the Constitution. The contention would have to be that the provision that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" should be construed as relating not only to rates to be established in the future, but also to rates established in the past, *notwithstanding that such rates established in the past were declared to be thereafter unlawful*. The construction contended for would necessarily have to be that this provision, if incorporated in the Constitution, nullified the prohibition of Section 21, and that notwithstanding the strongly prohibitory language of that section the Constitution as amended should be construed as having no reference to any rates which theretofore had been established by the Commission.

The result of this construction would be that the prohibition of Section 21 would be purposeless. Although it provided that no greater charge should be made for the shorter haul unless the Commission should upon the carrier's application grant authority therefor, it would (if counsel were correct) be read

with the proviso that no existing rates violative thereof should be affected thereby, but that such rates should continue to be lawful until after notice to the carriers the Commission should change them. The provision for an application by the carrier and an investigation by the Commission of the carrier's application would be nullified, as Section 21 would be construed not as requiring the carriers who sought relief to make application, but as requiring the Commission itself to initiate proceedings to "change" the rate. If the Commission did not initiate such proceedings and "change" the rates the carrier could continue to charge such rates for an indefinite period. As to such rates the prohibition of Section 21 would be entirely inapplicable and meaningless. The Constitution would be read as if the prohibition of Section 21 were non-existent, for wholly irrespective of that prohibition the Commission would have the power to change any rate theretofore established by that body.

Although the people rejected the proviso of Section 4 of the Act of Congress continuing existing rates in effect for six months, it is contended that the "existing" rates were continued in effect indefinitely—that the prohibition of Section 21 was totally destroyed insofar as it related to such "existing" rates.

Assuming for the purpose of the argument that higher rates for the shorter distance had been legal

prior to October 10, 1911, and that the Legislature and the people had wished to permit the carriers to continue to charge them after the adoption of the amendment and until the Commission had passed on the applications of the carriers, would they not have adopted Section 4 of the Act of Congress in its entirety? That is, would they have discarded the second proviso by which Congress accomplished that very purpose?

That the prohibition of the amended Section would have become effective at once would have been the necessary consequence of the language employed if such language had not been adopted from some other act. Even if there had been any ambiguity in the language (and there is not the slightest) the adoption of the first part of Section 4 of the Act of Congress and the rejection of the second proviso of that Section would beyond question have indicated the intention that the prohibition should become effective immediately.

The Legislature and the people had before them a model long and short haul clause which contained a proviso continuing existing rates in effect for six months, and, in case applications for relief were filed, until the determination by the Interstate Commerce Commission.

They rejected that proviso. Nevertheless, counsel say that by the reference to the Act of February 10,

1911 (Eshleman Act), in Section 22, they intended that certain provisions of that act should impair the effect of the strongly prohibitory terms of Section 21.

Let us assume that a carrier started in business after October 10, 1911. Would such a carrier be legally entitled to charge more for the shorter distance?

Clearly not, unless it had filed an application for relief and such application had been granted by the Commission, after investigation.

Such also would have been the effect of the Act of Congress, as the second proviso of Section 4 only authorized the temporary continuance of existing rates.

The people of California have not provided that any rates violative of the prohibition of the amended Section 21 can be lawfully charged. They have made no exception whatever to the prohibition. Yet counsel's argument leads to the result that a carrier in business at the time of the amendment could continue to violate the prohibition, but that a carrier who started in business subsequently to the amendment could not until he obtained a relief order from the Commission. But the Constitution contains no authority for this distinction. The prohibition is binding upon all and no carrier is entitled to charge the rates declared unlawful unless it brings itself within the terms of the proviso relating to applications to

and orders of relief by the Commission.

In construing the 4th Section of the Interstate Commerce Act, the United States Supreme Court in *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 323, said:

“For the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases*, 234 U. S. 476.”

So here it is clear that by the amendment to the Constitution (which fixed no future time) it was provided that no rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

Very recently a special United States District Court presided over by Hon. W. W. Morrow, Hon. M. T. Dooling and Hon. B. F. Bledsoe convened at San Francisco to hear the case of *Merchants & Manufacturers Traffic Assn. of Sacramento, et al., v. United States of America and Interstate Commerce Commission, et al.*, wherein the plaintiffs sought to enjoin an order of the Interstate Commerce Commission taking away terminal rates from Sacramento, Stockton and San Jose. The defendants contended that the order complained of was made in pursuance of the 4th Section of the Interstate Commerce Act. In holding that the order was void the Court said:

“Can the Commission suspend the long and short haul clause of Section 4 of the Act to Regulate Commerce without an application being made to it by the carriers for that purpose *and a hearing upon that particular application* as in a special case? We are of the opinion that this is beyond the statutory power of the Commission; and such we understand to be the decision of the Supreme Court of the United States in *U. S. v. L. & N. R. R.*, 235 U. S. 314, 322.”

This is even more clearly the case under our Constitution, for its provisions are mandatory and prohibitory, whereas those of the Interstate Commerce Act are not necessarily so, but may be directory merely.

In the case last cited the Special District Court had presented to it for determination the question as to whether the Interstate Commerce Commission had the power to authorize the charging of higher rates to intermediate points in a case where no application for permission to do so had been made by the carrier. The order taking away terminal rates from Sacramento and the other points was in effect an order permitting the carriers to charge more for the shorter distance.

A copy of the opinion of the Court in *Merchants and Manufacturers Traffic Assn. v. U. S.*, *supra*, is filed with this brief. 231 Fed. 292.

In *Mitchell v. Penn. R. R. Co.*, 230 U. S. 278, in a case which did not in any manner involve the 4th

Section of the Act of Congress, Mr. Justice Pitney in a dissenting opinion and by way of argument said :

“Clearly until the Commission acts the general prohibition (of Section 4) is unqualified, and when the Commission has acted its modification is as much law as the general prohibition was before.”

The “in pari materia” argument of Plaintiff in Error is authoritatively disposed of by the United States Supreme Court in *United States v. Louisville & Nashville R. R.*, 235 U. S. 314, *supra*. That case was an appeal from the Commerce Court. The Commerce Court had enjoined the enforcement of an order of the Interstate Commerce Commission holding that a certain reshipping privilege at Nashville violated Section 3 of the Interstate Commerce Act prohibiting undue and unreasonable preferences. (21 I. C. C. 186.) The Commission had found as a fact that the reshipping privilege was an undue and unreasonable preference. *The controversy both before the Commission and before the Commerce Court was as to whether or not the rebilling privilege constituted an unreasonable preference under Section 3 of the Act.* The Commerce Court assumed that it had jurisdiction to pass upon the matter and held that it was not an unreasonable preference. The decision of the Commerce Court was based upon the theory that in a case where the facts constituting the alleged unreasonable preference were undisputed it was com-

petent for the courts to pass upon the question as one of law. The Supreme Court held that the Commerce Court erred in holding that it had jurisdiction to pass upon a question of this kind. The Supreme Court held, however, that this error of the Commerce Court did not authorize the Supreme Court "to give effect to the order of the Commission without going further, since it must be determined whether the action of the Commission was repugnant to the Constitution, or in excess of the powers which that body possessed." (Page 321.) The Supreme Court then stated that if they undertook to consider these questions they would be confronted with a grave situation arising because of the manner in which the Commission had discharged its functions. It appeared that the Commission had received and acted upon evidence without any notice to the carrier as required by the Act of Congress. (Page 321.)

Continuing, the Supreme Court said that it was not necessary to determine whether there was an unreasonable preference under Section 3 of the Act, *as the evidence showed that the rebilling privilege constituted a violation of the long and short haul prohibition of Section 4 of the Act and that for that reason* (and not the reason upon which the Interstate Commerce Commission based its decision) *the rebilling privilege was illegal*. The Supreme Court, therefore, directed the Commerce Court to dismiss the bill of

complaint. The Supreme Court held that the rebilling privilege was illegal whether the Commission was right or wrong in its decision that it constituted an undue preference under Section 3 of the act, *and that it was illegal because in conflict with the long and short haul clause of Section 4.* In so deciding the Supreme Court (page 325) said:

“It is true that in argument it was said that the question here is whether there was a preference or discrimination under Secs. 2 and 3 of the act and not an inquiry under Sec. 4 and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of Secs. 2, 3 and 4 of the act being *in pari materia* required harmonious construction and therefore they should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permitted by Sec. 4 could not for such reason be held to be either a preference or discrimination under Secs. 2 or 3. *Louisville & Nashville R. R. v. Behlmer*, 175 U. S. 648; *East Tenn., etc., Ry. v. Interstate Com. Com.*, 181 U. S. 1. *But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction and indeed is in direct conflict with all three of the sections—a result clearly arising in the case before us in consequence of the amendment of Sec. 4.* Indeed when the evil which it may be assumed conduced to the adoption of the amendment of Sec. 4 and the remedy which that amendment was intended to make effective are taken into view (see *Intermountain Rate Cases, supra*), it would seem that

the case before us cogently demonstrates the applicability of the amendment to the situation. *And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things and not by names, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose."*

So here the provision that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" if it had been contained in Section 21 or Section 22 of the Constitution would not be permitted to authorize that "which is in direct conflict" with the Constitution and "devoid of all sanction."

The "in pari materia" argument is employed by counsel for Plaintiff in Error both in support of the contention that before October 10, 1911, the Railroad Commission could establish rates which violated the mandatory and prohibitory provision of Section 21 as it existed prior to the amendment of October 10, 1911, and also in support of the contention that after October 10, 1911, rates violative of the long and short haul prohibition of the amended Section 21 could lawfully be charged because of the provisions of Section 18 of the Act of February 10, 1911 (Eshleman Act) that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing."

The first of these contentions is replied to in Defendant in Error's brief at pages 124 *et seq.* and in Defendant in Error's Supplemental Brief at pages 56 *et seq.* As this matter was not discussed at the re-argument, it will not be further referred to here.

At the oral argument counsel for Plaintiff in Error said:

“Whether you find for the railroad company or against it on the first class of causes of action (the reference is to those accruing prior to October 10, 1911), the fact remains that on October 10, 1911, according to counsel's own admission, there was at least one legal rate there, and that was the 27½-cent rate to Los Angeles, which we claim was compelled by conditions. Counsel say that rate should be observed as a maximum to intermediate points. Think what utter confusion would result if at one fell swoop by a constitutional enactment all of the intermediate rates, no matter whether carrier made or Commission made, are wiped out.”

It would seem from the foregoing that it was the intention of counsel to contend that even if higher rates to intermediate points were unlawful prior to October 10, 1911, they became lawful on that date. The language quoted above is the nearest approach that counsel make to this contention; they evidently hesitated to state it clearly. Counsel have not stated how there could have been any higher intermediate rates to “wipe out” on October 10, 1911. As higher rates to intermediate points were unlawful on and

prior to October 10, 1911, there were on that date no existing intermediate rates which were affected by the amendment to the Constitution.

If we concede for the sake of the argument that the amendment to Section 21 of October 10, 1911, was the first enactment prohibiting higher rates to intermediate points, and that on and prior to October 10, 1911, such rates were lawful, the only reply that need be made to the argument that confusion would result from the immediate operation of the law is that it might have been a good argument to address to the Legislature which proposed the law and to the people who enacted it; but it is not an argument which it is proper to address to the courts.

The argument that inconvenience would result from the immediate operation of the prohibition made by Plaintiff in Error at the last argument, wherein counsel referred to the instance of the so-called "existing" rate on rice of $27\frac{1}{2}$ cents to Los Angeles and the "existing" rate of 36 cents to Fresno, was fully replied to at pages 59 to 64 of Supplemental Brief of Defendant in Error.

It is wholly immaterial whether or not the Commission prior to October 10, 1911, established the $27\frac{1}{2}$ -cent rate to Los Angeles. If the $27\frac{1}{2}$ -cent rate to Los Angeles was established subsequently to the establishment of the 36-cent rate to Fresno, it became the maximum rate to Fresno. If the Fresno rate was

established subsequently to the establishment of the 27½-cent rate to Los Angeles, it abrogated the lower rate to Los Angeles. In no event could the Constitution be violated. The record in this case, however, shows that the lower rate to Los Angeles was not established by the Commission but was voluntarily established by the carrier (First Special Defense, Record, Vol. 2, pp. 337-8).

2. NEITHER THE ORDER OF NOVEMBER 20, 1911, NOR THE ORDER OF JANUARY 16, 1912, PURPORT TO GRANT ANY OF THE APPLICATIONS OF THE DEFENDANT.

Under the amended Section 21 three things are required before a carrier can charge more for the shorter distance. These are: (1) An application by the carrier, (2) an investigation by the Commission, and (3) an order in a special case authorizing the carrier to charge less for the shorter distance.

The applications of Plaintiff in Error were not filed until December 30, 1911, so we are not concerned with the order of November 20, 1911. The order of January 16th is as follows (Tr. p. 426):

“Until February 15, 1912, the railroad and other transportation companies *may file for establishment with the Commission* in the manner prescribed by law and in accordance with the Commission’s regulations *such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points.*”

This order relates merely to the filing of amendments or supplements to the tariffs. It purports to permit carriers to file amendments or supplements containing higher rates to intermediate points. The part of the order reading “continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points” is a part of the provision that the carriers “may file for establishment

with the Commission * * * such changes in rates and fares as occur in the ordinary course of their business." It immediately follows such provision and can relate to nothing but the "changes," which the carriers are permitted to file for "establishment." If it were omitted the order would mean nothing, as it would then read "railroad and other transportation companies may file for establishment with the Commission in the manner prescribed by law, and, in accordance with the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business." In no possible view was such an order necessary, as the law prescribes the manner of filing such changes. The order clearly shows that the Commission deemed that when a "change" was made in a rate which was contrary to the constitutional prohibition that some sort of permission was necessary if the rate changed remained contrary to the constitutional provision. The clause reading "continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points," is a part of and depends upon the subdivision of the sentence or clause the subject of which is "railroad and other transportation companies," the predicate "may file" and the object "changes." The English language will not permit the words to be accorded any meaning other than that the "changes" filed with the Commission may continue

higher rates or fares to intermediate points. "Continue" in the sense that the word is here used means "to retain" and the present participle "continuing" means "retaining." (Webster's International Dictionary.) The part of the sentence quoted above means the same as if it read "retaining, under the present rate bases or adjustments, higher rates or fares at intermediate points."

After making the above provisions relating to the filing of "changes" containing higher rates to intermediate points the order provided in the following paragraph "The Commission does not hereby indicate that it will finally approve any rates and fares *that may be filed under this permission,*" showing clearly that the order related to "changes" in rates to be *thereafter* filed by the carriers.

While it is clear that the order of January 16, 1912, does not purport to grant any of the applications of the carriers but merely purports to permit them to file "changes" containing higher rates to intermediate points, it will not be out of place to review the various orders of the Commission made in the matter of the constitutional provision. All of these orders were made in a case numbered 214 upon the records of the Commission. Before doing so, however, two facts should be kept in view. First, that the Commission adopted the erroneous view that it had the right prior to October 10, 1911, to establish

rates which violated the absolute prohibition of the Constitution, and, second, that the prohibition of Section 21 of Article XII, as amended October 10, 1911, did not become "operative" until the Commission should so order. The first of these errors is shown by the Commission's decision in the *Scott, Magner & Miller Case* (*Scott, Magner & Miller v. Western Pacific Railway Co.*, Decision No. 579, 2 C. R. C. 626), which is referred to at length at pages 133 to 145 inclusive of the brief of Defendant in Error.

The second error is shown by the order of January 16th itself. This order provides that if the applications for relief are not filed by February 15th the provisions of the Constitution "will at once become operative." Not only is such error evidenced by that order, but it is apparent from the notice of October 26, 1911, and the order of November 20th, 1911.

Now with these two errors as a basis for their acts, let us see what the Commission did after the adoption of the amendment of October 10, 1911, to the Constitution. They waited until October 26th before taking any action and on that date gave the notice bearing that date, a copy of which appears in the Transcript at page 299. This notice recites that the carriers have on file tariffs containing rates violative of the constitutional prohibition and directed the carriers to file either new schedules removing such discrimina-

tion or applications for relief. The notice stated that such schedules or applications should be on file on or before January 2, 1912.

On November 20, 1911, *before any applications for relief had been filed*, the Commission made an order (Exhibit No. 5, Tr. p. 404) reading as follows:

“Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to *file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided*, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

“The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2d, 1912.”

It will be noted that the order of January 16, 1912, is practically identical with the order of November 20, 1911.

On December 30, 1911, the defendant filed its applications for relief.

On January 2, 1912, Case No. 214 came on for hearing before the Commission. A general discussion was held, but no evidence was introduced and the meeting adjourned without day. (Record p. 423.)

Next followed the order of January 16, 1912, referred to above.

The order of January 16, 1912, purported to grant to carriers permission to file *thereafter* "changes in their tariffs containing higher rates to intermediate points." As the supplements were not filed at the time the order was made, of course it would have been impossible for the Commission to have determined that the rates to intermediate points therein to be specified were reasonable. The fact of the matter is, as most clearly appears from the order of the Commission, there was not the slightest intention on the part of the Commission that the order should in any sense be an order granting relief. The Commission assumed that pending the investigation and determination of the applications it had the power to permit the carriers to violate the prohibition of the Constitution. The order itself shows that the very matters, the determination of which were necessary to a relief order, were not passed upon by the Commission, nor indeed could they have been, as the Commission was wholly in the dark as to what rates would be filed by the carriers in the supplements to their tariffs. As we have already seen, there is no contention that

any of the rates involved in this case were specified in any of the "changes" or supplements which may have been filed by the defendant in pursuance of the "permission" granted by the order of January 16, 1912.

It is not conceivable that the Commission when it made its orders of November 20, 1911, and January 16, 1912, for one moment supposed that it could make *the order granting relief provided for by the Constitution* without an investigation comprising an inquiry into the reason for the lower rate for the longer distance and the reasonableness of the higher rate for the shorter distance. The last paragraph of each order clearly shows that the Commission deemed that such proof was a necessary prerequisite to an order of relief. The fact is that the Commission when it made these orders assumed that the constitutional prohibition did not become operative in case applications were filed until the Commission had determined or passed on such applications. Nevertheless, the Commission was of the opinion that if a carrier wished to file a change in any "existing" rate, which change contained a rate violative of the constitutional prohibition, that some order of the Commission was proper before this could be done; hence the order of November 20, 1911, and the corresponding part of the order of January 16, 1912.

Every act which the Commission performed in

Case No. 214 shows the intent with which the order of January 16, 1912, was made. We may again refer to the order of November 20, 1911, which is in precisely the same terms as the order of January 16th, but which was made before any applications for relief had been filed and before the expiration of the time within which such applications were required to be filed by the notice of the Commission dated October 26, 1911. The order of January 16th is merely a continuation of the order of November 20th. Neither of these orders in any manner whatsoever relates to the granting in whole or in part of any of the applications for relief from the prohibition of Section 21 of Article XII of the Constitution.

The proviso relating to a relief order by the Commission was mandatory and prohibitory. (Sec. 22, Art. I of Const.) It provided the exclusive means of obtaining relief. Such would have been the effect of the proviso in Section 21 in the absence of the provision of Section 22 of Article I. The general rule of law governing the construction of provisos is stated in *Appeal of Clark*, 58 Conn. 207 (20 Atl. 456), as follows:

“A proviso in a statute is to be construed strictly, and takes no case out of the enacting clause, which is not fairly within its terms.”

At the oral argument counsel for Plaintiff in Error stated that in the Supplemental Brief of Defendant

in Error complaint was made that the Defendant in Error was "not notified of any of these proceedings." No complaint was made that the Commission had not notified the Defendant in Error of these proceedings. No one was entitled to notice of these proceedings. They were public in their nature and every one was charged with notice.

The only complaint made was that the Commission did not notify counsel for Plaintiff in Error of the pendency of the reparation case of *Scott, Magner & Miller Company v. Western Pacific* and of the reparation case of *Fresno Traffic Association v. S. P. Co. and A., T. & S. F. Ry. Co.*

In the early part of 1912 a large number of the shippers of the San Joaquin Valley combined for the purpose of recovering excessive freight charges exacted by the carriers in violation of the constitutional provisions as they existed both prior and subsequent to October 10, 1911. These shippers employed counsel and organized the California Adjustment Company, the Defendant in Error herein, to whom, for the purpose of convenience, they assigned their respective claims.

The Railroad Commission knew of the existence of this organization and knew of the decision of Judge Van Fleet to the effect that the Southern Pacific Company had not proved that it was relieved from the prohibition of the Constitution as amended October

10, 1911. They knew that the case was pending before this Court on writ of error and that it was set for hearing on the 9th of last November. On October 23rd last the reparation proceeding of Fresno Traffic Association was begun and on the 8th of November, the day preceding the hearing of this case, the Commission filed its opinion, which is printed at pages 43 *et seq.* of the Supplemental Brief of Plaintiff in Error. Although the avowed intention of the Commission at this proceeding (see pages 45-48 of Supplemental Brief of Defendant in Error) was to pass on Judge Van Fleet's decision, the Commission did not notify counsel for the shippers represented by the California Adjustment Company, the Defendant in Error in this case, of the pendency of this reparation proceeding or intimate to them that argument on the shippers' side of the legal question involved would be desirable, although it is the custom of the Railroad Commission so to notify counsel for organizations of shippers whenever it is supposed that a pending matter may interest such organizations.

The attitude of the Railroad Commission is wholly immaterial. The matter is referred to again solely because of the erroneous statement made at the oral argument to the effect that we complained that the California Adjustment Company was not notified of the proceeding initiated by the applications of the carriers for relief from the prohibition of the Constitution as amended October 10, 1911.

3. THE ORDERS OF THE COMMISSION OFFERED IN EVIDENCE DO NOT PURPORT TO BE ORDERS OF RELIEF MADE AFTER INVESTIGATION, AS THEY SHOW AFFIRMATIVELY THAT THE INVESTIGATION WAS TO BE HELD IN THE FUTURE.

The order of January 16, 1912, shows on its face that the investigation provided for by the Constitution was not held prior to the date of the order. This was the ground upon which Judge Van Fleet based his decision that it was not an order of relief under the Constitution. Judge Van Fleet said (Record p. 396):

“That order expressly shows they had not made any investigation up to that time because they fixed a future date for the investigation.”

The order of January 16, 1912, contains the following provision (Record p. 426):

“The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.”

The order states that “all of which rates and fares will be subject to investigation and correction,” and that the Commission “does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points.”

Argument is unnecessary to show that this is not an order made after investigation, as it shows on its face that the investigation was to be had in the future.

In the *Intermountain Rate Cases*, 234 U. S. 476, 485, the Supreme Court said:

“The authority of the Commission to grant or refuse the right sought is made by the statute to depend upon the facts established.”

In re *Application of S. P. Co. for relief from provisions of the Fourth Section of the Interstate Commerce Act*, 22 I. C. C. 366, 374, the Commission, per Mr. Commissioner Lane, said:

“It would seem therefore fundamental in the enforcement of the 4th Section that a carrier shall make proof *not only of water competition, but of the reasonableness of the rates applied to intermediate points.*”

See also:

L. & N. R. R. Co. v. U. S., 225 Fed. 571, 580.
(C. C. A.)

The order of November 20th contains provisions identical with those of the order of January 16th quoted above (Record p. 404).

The Railroad Commission has never claimed that the order of November 20, 1911, or the order of January 16, 1912, were orders of relief under the Constitution. All that the Commission has ever claimed is that they were orders made to “maintain the *status*

quo” pending investigation. This is clearly shown by the opinion of the Commission in *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677, cited by Plaintiff in Error at the oral argument. In that case the Commission said:

“The Commission’s order of October 26, 1911, in the long and short haul proceeding (Case 214), issued under authority of Section 21, Article XII of the Constitution, as amended on October 10, 1911, and in pursuance of which the defendant’s application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing, or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. *By this order the carriers were impliedly granted permission for practical reasons to maintain the status quo until the Commission passed upon such applications. By a subsequent order issued on November 20, 1911, in the same proceeding, express permission so to do was given.*”

For “practical reasons” the Commission “authorized” the carriers to maintain the “*status quo*”—that is, the Commission sought to assist the carriers to violate the constitutional prohibition. The so-called “*status quo*” was wholly illegal. Even if it had been legal, the amendment of October 10, 1911, which necessarily became operative at once, would have rendered the “*status quo*” illegal.

In no opinion has the Commission referred specifically to the order of January 16, 1912, but in the

Scott, Magner & Miller case, 2 C. R. C. 635, the Commission referred to an order made on February 15, 1912, as follows:

“Acting under the authority granted by Section 21 of Article XII of the Constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instances, if any, in which it will permit deviations to continue to be made.* While the Commission’s order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution.”

The order of February 15, 1912, is not in evidence in this case. This is the order referred to by the Commission in its opinion rendered on the 8th day of last November, the day preceding the first argument of this case. It will be noted that this reference to the order of February 15th clearly indicates that it was not an order of relief made after investigation. However, we are not here concerned with that order, as it was not offered in evidence by Plaintiff in Error.

Nor has the Plaintiff in Error ever contended that the Commission granted relief. The whole argument of Plaintiff in Error is predicated upon the erroneous assumption that after the amendment of October 10, 1911, carriers were legally entitled to violate the pro-

hibition of Section 21 until they were ordered to desist by the Commission. The contention of Plaintiff in Error is stated in its brief at page 108, as follows:

“That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterward, but all of them with the intention of preserving the status of the rates then being charged by Plaintiff in Error, until it could be determined by the Commission whether, and, if so, to what extent, it was entitled to relief.”

There is no contention here that the evidence offered by Plaintiff in Error tended to support the separate defense to the causes of action which accrued after October 10, 1911. That defense (Record p. 342) is as follows:

“For a seventh further and separate defense defendant states that as to each and all of the shipments referred to in plaintiff’s separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, California Constitution, as amended October 10, 1911, authorized defendant, after investigation, to charge more for the shorter distance to the point intermediate San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.”

Unquestionably this was a valid defense to the causes of action which accrued after October 10, 1911, and it was so deemed by the trial court. But the evidence offered did not sustain it, and in fact Plaintiff in Error does not contend that the offered evidence sustained it.

Not only does no order offered in evidence show that Plaintiff in Error's applications were granted, but it was so admitted at the trial, where counsel for Plaintiff in Error made the following admission:

"These petitions may be considered to have been pending until May 27, 1912. They had not been specifically acted upon either prior to that time or since that time, except insofar as the decision in Case No. 116, which I am going to offer shortly, may be considered to have affected them." (Record p. 406.)

4. THAT THE LONG AND SHORT HAUL PROVISION OF THE CONSTITUTION OF 1879 DOES NOT IN TERMS ATTEMPT TO REGULATE INTER-STATE COMMERCE, AND EVEN IF IT WERE SUSCEPTIBLE OF SUCH CONSTRUCTION, IT COULD NOT BE SAID THAT THE PEOPLE WOULD NOT HAVE PROHIBITED THE CHARGING OF MORE FOR THE SHORT THAN FOR THE LONGER HAUL WITHIN CALIFORNIA HAD THEY KNOWN THAT THEY COULD NOT ENFORCE SUCH A PROHIBITION IN THE CASE OF INTER-STATE COMMERCE.

This matter is discussed at pages 8 *et seq.* of the brief of Defendant in Error and at pages 2 *et seq.* of Supplemental Brief of Defendant in Error.

At the re-argument Plaintiff in Error cited the case of *C. M. & St. P. Ry. Co. v. Rock County Sugar Co.*, 156 N. W. 607 (Wis.)

C. M. & St. P. Ry. Co. v. Rock County Sugar Co., 156 N. W. 607 (Wis.), is practically the same as the Vermont case of *Sargent v. Rutland Railroad Co.*, 85 Atl. 654, cited by Plaintiff in Error in its brief and referred to at pages 15 to 17 of brief of Defendant in Error. Like the Vermont case, it involved a demurrage statute which in terms purported to govern demurrage on cars in both interstate and intrastate commerce. The Supreme Court of Wisconsin said:

“The statute purports to include all cases of shipments, whether local or interstate.”

From an inspection of the statute the Court reached

the conclusion that it “affects interstate commerce principally.”

As Congress has legislated on the subject of demurrage on cars in interstate commerce, the Court necessarily reached the conclusion that as applied to interstate commerce the statute was unconstitutional. The question then presented itself as to whether it could be enforced as to cars in intrastate commerce. The Court reached the conclusion, in view of the terms of the statute, that it could not be said that the Legislature would have enacted the statute if it knew that it would apply only to cars in intrastate commerce. The Court said:

“It is not necessary to specify in a State statute that it is limited to persons, property, or transactions within the State. But where the plain meaning of the statute is that it shall apply to these matters over which the State Legislature has jurisdiction, and equally to these matters over which the State Legislature has no jurisdiction, *and these subjects are so interrelated that it is reasonably apparent that the Legislature would not have attempted the regulation of one alone in the manner and to the extent specified in the statute, then the statute, being invalid in its main purpose, must be held wholly nugatory.*

* * * The provisions relative to local or State commerce covered by the same general words included in the same provisions and subject to the same duties do not, taking into consideration the words of the statute and *the subject matter of the regulation*, constitute a separate or severable portion of the statute which might survive.”

The Wisconsin statute made the right of the consignee to "free time" to unload and the right of the carrier to "demurrage" to depend upon the number of miles per day that the train moved which contained the car.

The Court said :

"State and interstate freight are carried in different cars of the same train, and sometimes in the same car."

It would be unreasonable to suppose that the Legislature would have enacted such a statute with reference to cars in intrastate commerce alone. The effect of such a statute, as pointed out by the Supreme Court of Wisconsin, would be to cause the carrier to expedite the cars containing intrastate shipments to the prejudice of cars containing interstate shipments.

Statutory provisions such as these cannot be without great difficulty applied to local traffic alone. The same cars are used for both interstate and local shipments; they are moved in the same trains; they often contain both interstate and local shipments. To provide for a higher rate of demurrage on cars containing local shipments than for cars containing interstate shipments would be to affect the movement of cars in interstate commerce.

As pointed out at pages 8 *et seq.* of the brief of

Defendant in Error and at pages 2 *et seq.* of the Supplemental Brief, the matter of a *prohibition against discrimination is a very different matter from a demurrage statute*. The people of California prohibited *discrimination* in charges within California and also on freight moving to or from other States. It is most apparent that the people desired to prevent discrimination *wherever they could*. It by no means follows because they were mistaken in assuming that they could prevent it in interstate commerce that they would not have declared it unlawful in California. *From the nature of the subject matter it is most apparent they would have declared it unlawful in California if they had known that they could not declare it unlawful in interstate commerce*.

Counsel's argument leads to the result that discrimination by a common carrier was lawful in California between 1879 and 1909, in which year the first statute declaring discrimination unlawful was enacted. During all these years it is said the constitutional prohibition against discrimination in charges within the State was inoperative because the people had also declared discriminatory charges unlawful on shipments going to or coming from other States.

The appellate courts of California have always assumed that the provision of Section 21 of Article XII of the Constitution as it existed prior to October 10, 1911, declaring discrimination unlawful, rendered

discrimination in rates unlawful in California.

Southern Pacific Company v. Superior Court,
27 Cal. App. 242, 247 (Rehearing denied by
Supreme Court).

Cowden v. Pacific Coast S. S. Co., 94 Cal.
470, 476.

There is much conflict in the authorities as to whether discrimination is unlawful in the absence of a statute declaring it illegal. The United States Supreme Court in *I. C. C. v. Baltimore & Ohio R. R. Co.*, 145 U. S. 275, said that the weight of authority was to the effect that it is unlawful at common law. The Supreme Court of California in *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, *supra*, held that discrimination was not contrary to the common law. This matter is referred to merely for the purpose of further illustrating the nature of a prohibition against discrimination and as showing how radically different it is from a demurrage statute.

In the *Trade-Mark Cases*, 100 U. S. 82, cited in the brief of Plaintiff in Error, the statute under consideration was an Act of Congress providing for the registration of trade marks and the punishment of persons counterfeiting trade marks so registered. The Supreme Court held that this act could not be upheld either as an act passed under the constitutional power of Congress to legislate on the subject of inventions and copyrights nor as an act passed under the commerce clause of the Constitution. The

act made no reference to interstate or foreign commerce, but was a general statute applying to trade marks wherever used. The Court said :

“It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade mark registration, for the benefit of all who had already used a trade mark or who intended to adopt one in the future without regard to the character of the trade to which it was to be applied.”

It was contended that the statute might be held valid as to trade marks used in interstate and foreign commerce. In replying to this contention the Court said :

“While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language which brings them within the constitutional power of that body.”

The Supreme Court cited the following language used by the Chief Justice in *U. S. v. Reese*, 92 U. S. 214 :

“We are not able to reject a part which is constitutional and retain the remainder *because it is not possible to separate that which is constitutional, if there be any such, from that which*

is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, *but by inserting those that are not there now.*”

In *Baldwin v. Franks*, 120 U. S. 678, cited by Plaintiff in Error in its brief, the Court had under consideration the following provisions of the Revised Statutes:

“Section 5519. If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * each of said persons shall be punished,” etc.

The Supreme Court had held in *U. S. v. Harris* that this section was unconstitutional as a provision for the punishment of the conspiracies of the character therein mentioned, within a State.

In *Baldwin v. Franks*, *supra*, it was contended that in the *Harris* case the conspiracy charged was by persons in a State against a citizen of the United States and of the State to deprive him of the protection he was entitled to under the laws of that State, no special privileges arising under the Constitution, laws or treaties of the United States being involved, and that the section was good for the punishment of those who conspired to deprive aliens of the rights guaranteed to them by treaty. The Supreme Court said:

“In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. *To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—may be capable of separation, so that each may be read by itself.* This statute, considered as a statute punishing conspiracies, in a state, is not of that character, for in that connection *it has no parts within the meaning of the rule.* Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.”

It will be noted that in *Baldwin v. Franks, supra*, the contention was in effect a request that the Supreme Court enact by judicial construction an act which Congress did not pass.

In *Baldwin v. Franks, supra*, the Supreme Court further said (p. 689):

“The point to be determined in all such cases is whether the unconstitutional provisions *are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature.*”

Considering the provision of Section 21 of Article XII against discrimination, it clearly appears that if the prohibition against discrimination in interstate commerce is stricken out the intent of the Legislature and the people will be made effective, for the Legislature and the people quite evidently realized that discrimination was an evil which should be prevented. To hold that they did not prevent this evil in intrastate commerce because they erroneously assumed that they could also prevent it in interstate commerce would not effect the intention of the Legislature and of the people to prevent the evil but would frustrate that intention.

In *U. S. v. Reese*, 92 U. S. 214, cited by Plaintiff in Error, the Court had under consideration a penal statute providing for the punishment of all persons who by force, bribery, etc., hindered or delayed any person from qualifying to vote or voting. The only theory upon which the statute could be upheld was that it was legislation in pursuance of the 15th Amendment, which provides that no discrimination shall be practiced against any person on account of race, color or previous condition of servitude. The

question which the Supreme Court considered was “whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the franchise, on account of their race, etc.”

The Supreme Court said:

“There is no attempt in the sections now under consideration to prescribe specifically for such an offense. If the case is provided for at all it comes under the general prohibition against any wrongful act or unlawful obstruction. *We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited to judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take the sections of the statute as they are. We are not able to reject a part which is constitutional, and retain the remainder, because it is not possible to separate that which is constitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by writing those that are not now there.*”

“The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.”

The rule that a State statute void in so far as it relates to interstate commerce may be enforced as to

local commerce is well illustrated by the *Case of State Freight Tax*, 82 U. S. 233 (15 Wall.) The decision in *Case of State Freight Tax* is described by the United States Supreme Court in *Supervisors v. Stanley*, 105 U. S. 306, as follows:

“*Case of the State Freight Tax* (15 Wall. 232) arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. *The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State.* The railroad companies, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. *This Court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void.* It said: ‘It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. * * * The conclusion of the whole is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried out of it, or articles taken up without the State and carried into it, is unconstitutional and void.’ The same language is repeated in *Erie Railway Co. v. Pennsylvania* (id. 282), decided at the same time. Both cases were remanded to the State court for further proceedings in conformity with the opinion, *which could only mean to enforce the tax on transportation limited to the State and not on interstate commerce.*”

“This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.”

A statute declaring discrimination in freight charges unlawful within the State and also declaring it unlawful in cases of shipments going to or coming from other States is not different in principle from the Pennsylvania statute imposing a tax on every ton of freight carried by every railroad in the State. If anything, the Pennsylvania statute as applied to local freight is less clearly valid than the statute against discrimination above referred to, for in the statute against discrimination the Legislature itself had separated the subjects, whereas in the case of the Pennsylvania statute the subjects of State and interstate commerce were embraced in the same terms.

In *Supervisors v. Stanley*, 105 U. S. 312, *supra*, the Supreme Court further said:

“The general proposition must be conceded, *that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.*”

Referring to the *Trade Mark Cases*, 100 U. S. 82, cited by Plaintiff in Error, the Supreme Court said (p. 312):

“The Court in the two cases cited in the brief of *U. S. v. Reese*, 92 U. S. 214, and *Trade Mark Cases*, 100 U. S. 82, concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so.”

In *Chamberlain v. Cranbury*, 57 N. J. Law 605, 614 (31 Atl. 1036), it was held that a statute conferring upon females the right to vote at any school meeting, although unconstitutional so far as it assumed to confer the right to vote for school trustees, is valid in respect to all other privileges granted, including the right to vote to raise money and to issue bonds. In this case the *Trade Marks Cases*, 100 U. S. 82, and a number of other decisions of the United States Supreme Court were considered. The Court said (p. 617):

“I think there is nothing to display on the part of the Legislature *an intention not to confer upon females all the powers which the act professes to confer, which are within the ability of the Legislature to confer*. I think it cannot be said that the Legislature would not have passed the act conferring power upon females to vote at all, because the power conferred to vote upon one matter is nugatory.”

In *Waters Pierce Oil Co. v. Texas*, 177 U. S. 28, 42, the Supreme Court considered a statute of Texas declaring that it should be unlawful for any foreign corporation violating certain provisions of the act to do any business in the State. It was contended that the statute was void as it did not except inter-

state business, and in support of this contention the *Trade Mark Cases* (100 U. S. 82) and other cases were cited. The Supreme Court said:

“They do not sustain the contention.”

In *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 423, the Supreme Court held valid an act of the Legislature of Ohio imposing a tax on the gross receipts of telegraph companies. The Telegraph Company contended that the act, being void as to receipts from its interstate business, was void *in toto* (p. 417). In overruling this contention the Supreme Court said:

“Neither are we of opinion that there is any real question, under the decisions of this Court, in regard to holding that, as far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, *and that so far as it was only upon commerce wholly within the State it was valid. This precise question was decided in the case of The State Freight Tax*, 15 Wall. 232.”

It is apparent that it is more difficult to apply this statute to intrastate business than it would be to apply a statute against discrimination to intrastate business. Before the Ohio statute could be applied the receipts of the telegraph company from interstate and intrastate business had to be segregated. Every shipment of freight over a railroad is a sep-

arate transaction. An intrastate movement cannot be confused with an interstate movement.

In both *State Freight Tax Case*, 15 Wall. 232, *supra*, and *Ratterman v. Western Union*, 127 U. S. 411, 423, *supra*, it was conceded that the Legislature intended that the tax should be levied upon interstate commerce as well as on State commerce.

In *Weems v. United States*, 217 U. S. 349, 382, the Supreme Court said that a valid part of a statute should be separated from the part which was invalid “*unless their union was made imperative by the Legislature*” (citing *Employers’ Liability Cases*, 207 U. S. 463).

Judge Cooley in his work on *Constitutional Limitations* (7th Ed.) at page 246 states the rule as follows:

“Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are *connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed that the Legislature would have passed the one without the other*. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand and the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but *whether they are essentially and inseparably connected in substance*. If, when the unconstitutional part is

stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained."

Judge Cooley further states (p. 250) :

"If there are any exceptions to this rule, they must be of course where it is evident from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated, if it shall be held valid as to some cases and void as to others."

In *Houston & Texas Cent. R. R. Co. v. Mayes*, 201 U. S. 321, the Supreme Court had under consideration a statute of Texas imposing a penalty upon common carriers who failed within a certain number of days after demand to provide cars for the shipment of stock. The statute in general terms applied to both interstate and intrastate shipments. The Supreme Court held that as applied to interstate commerce it was void.

In *Allen v. Texas & Pac. Ry. Co.*, 101 S. W. 792 (Tex.), decided subsequently to the decision of the United States Supreme Court, the Supreme Court of Texas held that as applied to intrastate commerce the statute was valid notwithstanding its invalidity as to interstate commerce. The Court said:

"Conceding that the statute was intended to apply to that subject (interstate transportation)

as well as to intrastate transportation, *it does not follow that it cannot operate upon the latter.* Whether or not it can have such restricted operation depends upon the well-known principles by which courts determine the effect of statutes partly, but not wholly, affected by constitutional infirmity. Assuming for the moment that the statute would have been valid if its operation had been expressly confined to transportation entirely within the State, the question is, whether or not it may be allowed to so operate, notwithstanding the attempt to make it embrace interstate transportation also, and the defeat of such attempt. The case, upon the assumption stated, is one of a statute applying to more than one subject, one of which it can and the other of which it cannot be made to govern.”

The Texas Court, after quoting from *Cooley's Constitutional Limitations*, pp. 215-216, said:

*“The main purpose the Legislature had in view in passing the statute was to enforce the duty of railroad companies promptly to furnish cars in which all property to be shipped over their lines might be started on its course, whether destined to points within or points without the State. * * * Believing that, when properly construed and applied, it may legitimately control the furnishing of cars for intrastate shipments, we are unwilling to say that the Legislature did not intend that it should operate so far, whether it could have the full effect intended or not.”*

The statute under consideration by the Texas Supreme Court appears in the margin of page 326 of Volume 201 of the United States Supreme Court Reports. The language employed by the Legislature

was general in its terms and applied to both intra-state and interstate shipments.

The Texas Supreme Court said that the *main purpose* of the Legislature was to enforce the duty of carriers to furnish cars promptly. So in the case of Section 21 of Article XII of the Constitution the main purpose of the people was to prevent discrimination, a manifest evil. There might have been some reason in the Texas case for holding that the Legislature did not intend that the particular statute then under consideration should apply to intrastate commerce only, but there can be no doubt whatever that the people would have declared discrimination unlawful in California if they knew that they could not declare it unlawful in interstate commerce.

See also:

Presser v. Illinois, 116 U. S. 252, 263.

State v. Peet, 68 Atl. 661, 666 (Vt.)

Skaneateles etc. Co. v. Village, 55 N. E. 562, 566 (N. Y.)

El Paso v. Gutierrez, 215 U. S. 87, 93.

International Textbook Co. v. Pigg, 217 U. S. 112, 113.

Oliver & Sons v. C., R. I. & P., 117 S. W. 238, 240 (Ark.)

Ex parte Agnew, 131 N. W. 817, 820 (Neb.)

S. P. Co. v. Railroad Commission, 78 Fed. 236, 257-8.

In the case last cited Mr. Justice McKenna, then Judge of the Circuit Court for the Northern District of California, held that the provision of Section 22

of Article XII of the Constitution that all rates established by the Commission should be deemed conclusively just and reasonable was unconstitutional, but that its unconstitutionality did not impair the other provisions of Section 22 creating the Commission and empowering it to establish rates.

We have been arguing upon the erroneous assumption that there is before the Court this question: Will it be presumed that the people of California would have declared discrimination unlawful in California if they had known that they could not declare it unlawful in interstate commerce? The answer to the question is obvious.

But in reality this question is not before the Court. As pointed out in the briefs on file, the long and short haul provision is a separate and distinct provision from the provision prohibiting discrimination. *The long and short haul provision is complete in itself.* It reads:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing.”

As said by the Supreme Court of the United States in *Louisville & N. Ry. Co. v. Kentucky*, 183 U. S. 503, in construing the long and short haul clause of the Kentucky Constitution, “*the long and short haul distances mentioned are evidently distances upon the railroad within the State.*”

5. THAT THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION OF 1879 AND THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION AS AMENDED OCTOBER 10, 1911, DO NOT VIOLATE THE FEDERAL CONSTITUTION.

This subject was discussed at pages 20 *et seq.* of brief of Defendant in Error. No further argument in relation thereto was made in the Supplemental Brief of Defendant in Error for the reason that the subject was not referred to in Plaintiff in Error's Supplemental Brief.

The matter was not referred to at the re-argument.

6. A PERSON WHO IS REQUIRED TO PAY MORE THAN THE LEGAL CHARGE FOR TRANSPORTATION OF FREIGHT HAS A COMMON LAW RIGHT TO RECOVER THE OVERCHARGE, AND IN ADDITION TO SUCH COMMON LAW RIGHT HAS THE STATUTORY RIGHT CONFERRED BY THE STATUTES OF 1909, 1911, AND THE PUBLIC UTILITIES ACT. HEREIN OF THE CONTENTION THAT DEFENDANT IN ERROR'S ASSIGNORS WERE NOT "DAMAGED."

This matter was discussed at pages 40 *et seq.* of brief of Defendant in Error and also at pages 7 *et seq.* of Supplemental Brief of Defendant in Error.

The specific contention that the Defendant in Error was not "damaged" is replied to under this head at pages 66 to 83 of Defendant in Error's brief, and at pages 7 to 28 of the Supplemental Brief of Defendant in Error.

The contention that Defendant in Error was not "damaged" was again made at the re-argument. In support of this contention the cases of *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, and *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 200, were cited.

These cases were cited in the briefs of Plaintiff in Error in support of this contention.

The case of *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, *supra*, not only fails to support counsel's contention, but is direct authority to the effect that the assignors of Defendant in Error are entitled to recover the difference between the higher charges

paid by them for the shorter distances and the lower rate charged by Plaintiff in Error for the longer haul.

The *Parsons* case was an action to recover damages for a violation of the long and short haul clause of the 4th Section of the Interstate Commerce Act before the amendment to that Section on June 18, 1910. The trial court sustained a demurrer to the complaint on the ground that the complaint did not show a violation of the long and short haul clause of the act, and this judgment was affirmed by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals was affirmed by the Supreme Court upon the ground that the complaint stated no violation of the long and short haul clause of the act. *The Supreme Court said, however, that if there had been a violation of the long and short haul clause the plaintiff would have been entitled to recover the difference between the rate which he had paid and the lesser rate for the greater distance.* The Court said:

“If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped.”

The plaintiff in the *Parsons* case shipped corn from Iowa points to Chicago. The complaint did not show that the rates from Nebraska points to Chicago were lower than the rates paid by plaintiff;

nor did it show that the rate charged plaintiff from Iowa points to Chicago was greater than the through rate charged from Nebraska points to New York and other places on the Atlantic seaboard. The Supreme Court said:

“There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places.”

The decision of the Supreme Court in the Parsons case conclusively shows that the Supreme Court deemed the measure of damages under the Interstate Commerce Act in case of a violation of the long and short haul clause to be the excess over the charge that would have been collected had there been no violation of the act.

The case of *Parsons v. C. & N. W. Ry. Co.*, 67 U. S. 447, *supra*, is referred to and the opinion therein quoted from at pages 21 to 26 of the Supplemental Brief of Defendant in Error.

Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, *supra*, was an action to recover damages for rebating. The Supreme Court held that the plaintiff was entitled to damages, but that the measure of damages was not necessarily the difference between the lawful rate paid by plaintiff and the unlawfully

low rate paid by the favored shipper. If the measure of damages contended for by plaintiff had been allowed the suit would have been in effect an action to recover a rebate similar to that unlawfully accorded the favored shipper. The Supreme Court said:

“Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged.”

The Supreme Court further said:

“Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers.”

The decision of the Supreme Court in *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, *supra*, is referred to at length and the opinion quoted from at pages 69 to 75 of brief of Defendant in Error and at page 18 of Supplemental Brief of Defendant in Error.

The case of *Nix v. Southern Ry. Co.*, 31 I. C. C. 145, cited at the oral argument, was also cited by Plaintiff in Error in its briefs. It is referred to at page 17 of Supplemental Brief of Defendant in Error. It is uncertain whether the complainants actually paid charges maintained in violation of the 4th Section of the Act of Congress or whether they were complaining merely because other shippers at more distant points were accorded lower rates (p. 149). If the Interstate Commerce Commission in-

tended to hold that a shipper who paid for a shorter haul a rate in excess of that charged by the carrier for the longer haul was not damaged in the amount of the difference, its decision is directly opposed to those of every court where the question has arisen. The only authority cited by the Commission is *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184. That, as we have seen, was a case where the plaintiff was charged the lawful rate and sought to measure his damages by the difference between such lawful rate and the unlawful rate accorded another shipper.

In every case where the question has come before the courts it has been held that for a violation of the long and short haul clause the plaintiff is entitled to recover the difference between the rate paid by him and the lower rate charged to the more distant point.

It was so held in each of the following cases where the matter was directly involved:

- Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, *supra*.
- Louisville & N. Ry. Co. v. Walker*, 63 S. W. 20 (110 Ky. 961).
- Hutchinson v. R. R. Co.*, 57 S. W. 25 (Ky.)
- Junod v. C. & N. W. Ry. Co.*, 47 Fed. 290.
- Osborne v. C. & N. W. Ry. Co.*, 48 Fed. 49.
- Twells v. Penn. R. R. Co.*, 2 Walker 450 (3 Am. Law Reg. N. S. 728) (Penn. Supreme Court).

These cases are cited and the opinions therein

quoted from at pages 52 *et seq.* of brief of Defendant in Error.

In *Louisville & N. Ry. Co. v. Walker*, 110 Ky. 961 (63 S. W. 20), *supra*, the Supreme Court of Kentucky said:

*“As one means of protecting the local shipper, this section fixed a maximum limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge. * * * And, when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge.”*

Topeka etc. Assn. v. St. Louis etc. Co., 13 I. C. C. 620, cited at the last argument, was decided in 1908, over two years before the amendment to Section 4 of the Interstate Commerce Act. At that time it was not unlawful to charge more for the shorter distance unless conditions were substantially similar and the statute was construed by the Supreme Court as leaving the primary determination of that question with

the carriers. Moreover, in the case cited the Commission said that the freight to the long haul point did not move through the intermediate point, but by an entirely different route. In the case at bar freight destined for Los Angeles over defendant's line moved through the points to which plaintiff's assignors shipped. The *Topeka* case was primarily a case involving the adjustment of rates. The 4th Section of the act was only incidentally involved. The Commission did not refer in any way to the measure of damages. Reparation was asked by the complainants, but as the Commission reached the conclusion that the act was not violated and that the rates should not be re-adjusted the complaint was dismissed without making any reference whatever to reparation.

The case of *Godwin v. Railway Co.*, 31 I. C. C. 25, did not involve a violation of the long and short haul clause of Section 4 of the act. That case involved charges upon through shipments which were in excess of the aggregate of the charges from the point of shipment to an intermediate point and the charges from such intermediate point to destination. Section 4 of the Act of Congress as amended on June 18, 1910, also declares that it is unlawful for a carrier "to charge any greater compensation as a through route than the aggregate of the intermediate rates." *But in the Godwin case the carrier, in pursuance of Section 4*

of the act, had filed an application for permission to charge a higher rate than the sum of the intermediate rates and this application was pending when the charges complained of were exacted. The Commission said :

“It is our conclusion that inasmuch as the situation was protected by an application for relief from the provisions of the fourth section, which had not been passed upon, and as the violation of the rule of that section has been removed, no reparation should be awarded.”

As the higher rate for the through haul was expressly continued in force by the amended Section 4 in all cases where applications were filed prior to six months after the passage of the act, it is clear that there was no violation of the fourth section of the act involved in the *Godwin* case.

The Commission went on, however, to ascertain whether or not the through rate was reasonable, that is, to ascertain if it violated the provision of the act that all rates should be reasonable. The complainant offered no evidence in support of the claim that it was unreasonable other than the evidence that it was in excess of the sum of the intermediate rates. The Commission held that this evidence raised a strong presumption that the through rate was unreasonable, but that this presumption was rebutted by the evidence offered by the defendants.

As in the *Godwin* case there was no violation of the

Act of Congress, it necessarily followed that the complainant was not damaged.

In *Stewart Greer Lumber Co. v. St. Louis etc. Co.*, 29 I. C. C. 120, also cited at the last oral argument, the charges exacted were not in violation of the fourth section of the act, *as the situation was protected by a fourth section application*. The application for relief was heard and denied at the same time that the complaint of the Stewart Greer Lumber Co. was heard. The Commission held that the rate paid by complainants was not unreasonable (p. 121). The rate charged did not violate the fourth section, nor the provisions of the act requiring all rates to be reasonable. Necessarily, therefore, the Commission did not award reparation. Referring to its denial of the fourth section application of the carrier, the Commission said:

“Our order under the fourth section will make unlawful for the future the maintenance of a higher rate by defendants from Mangham, Baskin and Winnsboro (the intermediate points) to New Orleans for export than is contemporaneously maintained by them from Rayville (the more distant point) to New Orleans.”

If after the denial of the fourth section application the carrier had continued to charge a higher rate from the intermediate points, can it be doubted that the Commission would have awarded reparation based on the difference between the rates?

At the last oral argument counsel for Plaintiff in

Error said: "In the case at bar practically all of the complainants are mercantile firms who have absorbed whatever difference there is in the cost of their wares and goods, and will naturally absorb whatever judgment they may get in this case"; and in support of this statement cited the opinion of the Railroad Commission of California in the case of *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677. In that case the Commission refused to award reparation to a shipper who had paid more for the shorter distance upon the ground that:

"It was fair to assume complainant based his selling price upon cost and carriage and made his profit, in which event, reparation, if due to anyone, is due to the people to whom complainant sold his wares."

The theory upon which reparation was denied by the Railroad Commission has been so completely refuted by the courts and by the Interstate Commerce Commission that it is indeed remarkable that the Railroad Commission of California should persist in countenancing it.

The theory that a shipper of freight who sells the goods upon which he paid the unlawful charges is not entitled to recover the overcharge because he may have partly "reimbursed" himself upon a sale is directly opposed to the very first principles of the law. It would cast upon the courts or the Commission

the impossible task of determining whether as to each and every shipment made the shipper was in a position in some manner to recoup himself for the unlawfully high rate which he was required to pay.

The contention which has been acquiesced in by the Railroad Commission of California was made before the Interstate Commerce Commission in *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C. 668, 679 (cited and quoted from at page 78 of brief of Defendant in Error). In that case the carrier contended that the complainant was not damaged "because the advance in the freight rate had been added to the price paid by the customer." In overruling this contention the Interstate Commerce Commission said:

"It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word 'damage' is to be interpreted and applied as claimed by the defendants.

"Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid,

it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity."

In *Kindelon v. S. P. Co.*, 17 I. C. C. 251, 255, the Interstate Commerce Commission said:

"The defendants further contend that the complainants herein have not shown that they were damaged. It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. The shipper who has been charged an unlawful rate and who is the owner of the goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business."

In *Michigan Hardwood Mfrs. Assn. v. Freight Bureau*, 27 I. C. C. 32, 39 (decided May 6, 1913), the Interstate Commerce Commission said:

*"The defendants urge that, inasmuch as the complainants increased the price of their lumber by the amount of the increase in the transportation charge, they have suffered no damage. * * **

** * ** The profit which a lumber manufacturer makes depends not only upon his profit

per 1,000 feet, but also upon the number of thousand feet which he sells. The hardwood lumber which is consumed upon the Pacific Coast is brought in from foreign countries as well as from the East. An advance of \$4 per 1,000 feet would certainly tend to limit the sales of the Eastern producer as compared with his foreign competitor. *Assuming, therefore, that an advance equal to the increase in the freight rate was charged, the number of sales might have declined so that the total profit to the shipper was very much less than it otherwise would have been. Evidently the complainants' damages could not be assessed upon any such speculative basis.* * * * We find that these complainants have been compelled to pay a rate of 85 cents and that the complainants have been damaged by that amount which the defendants have unlawfully exacted from them."

The latest case before the Interstate Commerce Commission where this contention was made and replied to is *Ballou v. N. Y., N. H. & H. Co.*, 34 I. C. C. 120 (decided April 15, 1915). In that case Ballou & Co., wholesale dealers in motorcycles at Portland, Oregon, had motorcycles shipped to them from Armory, Massachusetts. The complainant asked the Commission to reduce the rate, which was alleged to be unreasonably high. The Commission found the rate unreasonable, reduced it, and awarded reparation. In awarding reparation the Commission said:

"The single question contested is complainant's right to reparation, defendant showing *that complainant added an arbitrary sum of \$15 to the sale price of each motorcycle to cover*

freight and local drayage charges, from which they argue that complainant suffered no damage and therefore is not entitled to reparation. This question is concluded by Burgess v. Transcontinental Freight Bureau, 13 I. C. C. 668, affirmed in Michigan Hardwood Mfrs. Assn. v. Freight Bureau, 27 I. C. C. 32, in which we said:

“These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were therefore deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.”

“Carriers cannot be heard to say that reparation for the exaction of unreasonable freight charges should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from the purchaser.”

The Supreme Court of the United States in the case of *Union Pacific v. Goodridge*, 149 U. S. 680, expressly held that in an action to recover damages for charging unlawful rates on coal the *question of the profits which the plaintiff made upon a sale of the property transported was too remote to be made an element of damages.* This was an action brought to recover excessive freight charges under a Colo-

rado statute. The Colorado statute, unlike the Interstate Commerce Act, expressly provided that the lawful rate should be the lowest rate charged to any shipper. Under this statute it was not unlawful to give rebates, but if they were allowed the resulting lower rate became the lawful rate. Judgment was rendered in favor of the plaintiffs and in the Supreme Court the defendant contended that "there was no sufficient evidence to support the verdict and especially as to the amount of damage." *The defendant contended that it was incumbent upon the plaintiffs to show that in selling the coal to their customers they had not been reimbursed in whole or in part for the excessive charges.* In overruling this contention the Supreme Court said:

"The damages sustained by plaintiffs were measured by the amount of such rebate which should have been allowed to them. *The question whether they lost profits upon the sale of this coal by reason of the non-allowance of such rebates was too remote to be made an element of damages.*"

The case of *Ballou v. N. Y., N. H. & H. Co.*, 34 I. C. C. 120, *supra*, is not cited in the briefs of Defendant in Error.

Phoenix Milling Co. v. S. P. Co., 7 C. R. C. 677, cited by Plaintiff in Error, is not the only case where the Railroad Commission of California erred in this respect. In *Steiger Terra Cotta & Pottery Works v.*

S. P. Co., 7 C. R. C. 288, decided about the same time as the *Phoenix Milling Company* case, the Commission held that a shipper who paid an unreasonably high, and therefore unlawful, rate, on raw clay, was not entitled to reparation unless he could show that he was not "reimbursed" upon a sale of the goods transported, or in this particular case upon a sale of the finished product manufactured from the raw clay. In the case last mentioned the complainant paid an unreasonably high rate upon shipments of raw clay to its factory. The raw clay was not sold by the complainant, but products manufactured therefrom were sold. The complainant attempted to satisfy the rule of the Railroad Commission that it should show that it was not "reimbursed" upon a sale of its manufactured product for the excessive charges exacted. The president of the complainant corporation testified that it was operating at a loss.

In holding that the complainant was not entitled to reparation the Railroad Commission said:

"Steiger Terra Cotta and Pottery Works, through its president, testified that it was operating at a loss; that the prices at which, through competition, it was compelled to sell its products did not return sufficient to cover the cost of manufacturing the goods and managing the business. But it is significant that factories engaged in the same business as this complainant are operating in the same locality at a profit. It may well be, therefore, that the loss suffered by this complainant is not due to the collection by the carriers of

an unreasonable rate for the transportation of clay. The loss on complainant's business may be due to the more advantageous location of competing plants, or to the ability of such competitors to manufacture or market their wares more cheaply than complainant, because of more favorable labor conditions, or because of more favorable rates on the manufactured products from the plant to the markets where the products are sold. *While complainant is operating its business at a loss, there is nothing in the record to show that the complainant has not been reimbursed at least for the unreasonable rate collected on the clay shipped to its factory."*

The utter absurdity of the rule of the Railroad Commission of California that a shipper who paid an unlawful rate is not entitled to recover the excess over the lawful rate unless he can also show that he did not "base his selling price on cost plus carriage" is shown by the opinion of the Commission last referred to. In that case there was imposed upon a manufacturer the impossible task of proving that he was not "reimbursed" by customers who purchased the manufactured product. To attempt to do so, he would have to keep a record of each particular article manufactured from the shipment upon which he paid the unlawful rate and trace in every sale of such article the exact cost; to this cost he would add the "carriage," including the excessive freight rate, and to the sum he would add that most indefinite and uncertain sum which he would call his "profit." If the sum of these should exceed the sum of the purchase

price received on a sale of every article manufactured from that carload of clay such excess might be his "damage."

The Railroad Commission of California is the only tribunal, judicial or quasi-judicial, which has ever countenanced such a theory. Wherever else it has been suggested it has been refuted.

At the last oral argument counsel for Plaintiff in Error with reference to the decisions of the Railroad Commission made the following statement:

"When they act in a manner touched by their judicial functions, their decisions, I take it, are entitled to the same amount of weight as any corresponding court of California."

The exigencies of this case have impelled Plaintiff in Error to advance many novel propositions of law, but none more novel or startling than this. The Supreme Court of California and the District Courts of Appeal are ordained by the Constitution for the purpose of authoritatively construing the laws of California. The power to construe the laws was not vested in the Railroad Commission. Necessarily any body exercising judicial functions is required to construe the law for the purpose of the inquiry then being conducted; but its construction of the law is not authoritative. The power of the Railroad Commission is not different in this respect than the power of a Board of Supervisors when it takes the various

steps required by statute for the purpose of organizing an irrigation district. All the Supreme Court of California held in the *Telephone* case (166 Cal. 640, 650) was that "the powers and functions of the Railroad Commission in many instances, and in the present one, are of a highly judicial nature." The power under consideration by the Supreme Court related to compelling physical connection between competing telephone companies. The question as to whether or not the powers exercised by the Commission were judicial was necessarily before the Court because the application in the *Telephone* case was for a writ of *certiorari*, which will be issued only to a body exercising judicial functions. In holding that the powers were of a judicial nature and that the writ should issue, the Supreme Court cited as authority the case of *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 114, wherein the Court had held that a Board of Supervisors in taking the steps required by statute for the organization of an irrigation district exercises judicial functions.

As pointed out at page 72 of brief of Defendant in Error, and at page 20 of the Supplemental Brief, the provision of the Constitution as it existed prior to October 10, 1911, is *for the express benefit of the shipper to the intermediate point*. In plain and unambiguous language it conferred upon him the right to have his property transported to the less distant

point at charges not exceeding the rate maintained for the greater distance. It read:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing.”

Not only was it declared unlawful to charge a higher rate to the more distant point, but it was *expressly provided* that the rate to the more distant point should be the maximum rate which could be charged to the less distant point. On October 10, 1911, the form of the prohibition was changed and a relief clause added. It is clear that there is nothing in this change which abrogated the right (which existed prior to October 10, 1911) of a shipper to have his property transported at charges not exceeding the rate charged to the more distant point.

It does not make a particle of difference, however, whether the long and short haul provision is expressed in the terms employed in the Constitution of California prior to the amendment of October 10, 1911, or in the terms employed in the 4th Section of the Interstate Commerce Act and in Section 21 of Article XII as amended October 10, 1911. The effect of the provisions is the same—the form only is different.

If a statute provided that the rate for a certain service should be ten dollars, a person required to pay more than ten dollars would have a cause of action to recover the excess and such excess would necessarily be the measure of his damages. On the other hand, if the statute in terms provided that it was unlawful to charge more than ten dollars, the measure of damages of a person required to pay more would be the same.

7. THAT IT IS WHOLLY IMMATERIAL WHETHER FORMAL PROTEST WAS MADE AT THE TIME OF THE PAYMENT OF THE ILLEGAL CHARGES.

The matter above referred to was discussed at pages 84 *et seq.* of brief of Defendant in Error. The matter was not referred to in the Supplemental Brief of Defendant in Error for the reason that it was not discussed in Plaintiff in Error's Supplemental Brief. The matter was not referred to at the last oral argument.

8. THE RAILROAD COMMISSION HAS NO POWER TO ESTABLISH RATES CONTRAVENING THE CONSTITUTIONAL PROVISION, AND IF IT ASSUMED TO DO SO ITS ACT WAS VOID.

This matter was discussed at pages 124 *et seq.* of brief of Defendant in Error and at page 56 of Supplemental Brief of Defendant in Error. It was not referred to at the last oral argument.

9. THAT IT WAS NOT INCUMBENT UPON THE PLAINTIFF BELOW TO PROVE THAT THE COMMISSION HAD NOT RELIEVED PLAINTIFF IN ERROR FROM THE PROHIBITION OF THE CONSTITUTION, BECAUSE IF SUCH RELIEF HAD BEEN GRANTED, IT WAS A MATTER OF DEFENSE WHICH THE LAW REQUIRED THE DEFENDANT TO PLEAD AND PROVE.

This matter was referred to at page 155 of brief of Defendant in Error. It was not referred to in the Supplemental Briefs of Plaintiff in Error or Defendant in Error, nor was it referred to at the final oral argument.

10. NO REPARATION ORDER OF THE RAILROAD COMMISSION WAS NECESSARY IN ORDER TO ENTITLE THE PLAINTIFF, OR ITS ASSIGNORS, TO MAINTAIN AN ACTION IN THE COURTS.

This matter was discussed at pages 158 *et seq.* of brief of Defendant in Error and at pages 87 *et seq.* of Supplemental Brief of Defendant in Error. It was not referred to at the last oral argument.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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